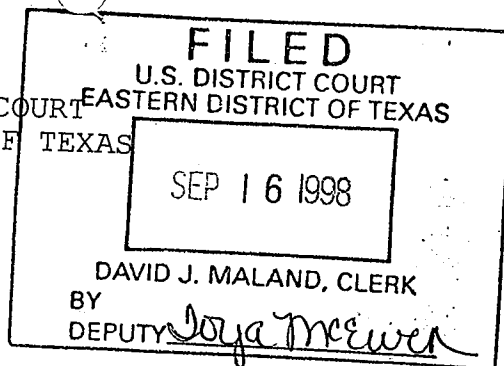


EOD 9-16-98

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION



UNITED STATES of AMERICA,
Plaintiff,

v.

McKINNEY SMELTING, INC.,
Defendant.

Civil Action

No. 97

4:98cv204

CONSENT DECREE

WHEREAS, Plaintiff, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), has simultaneously filed a Complaint against Defendant, McKinney Smelting, Inc. ("MSI"), seeking civil penalties and permanent injunctive relief pursuant to Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973; Section 15(1)(C) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2614(1)(C); and Sections 301(a) and 402(p) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a) and 1342(p);

WHEREAS, the United States' Complaint seeks a permanent injunction to require MSI to perform all actions necessary to abate conditions which may pose an imminent and substantial endangerment to public health and the environment connected with the contamination of the areas on and around the MSI facility;

WHEREAS, the United States has entered into an Agreement and Covenant not to Sue with MSI's lessee, Ferex, Inc. ("Ferex"), to address the environmental contamination at and around the MSI facility in accordance with an agreed Statement of Work ("Ferex SOW");

WHEREAS, the United States has outstanding claims against MSI for civil penalties for MSI's alleged violations of the CWA and TSCA;

WHEREAS, MSI has denied the United States' allegations;

WHEREAS, the United States and MSI agree, without adjudication or admission of facts or law, (except as provided in Section I ("Jurisdiction and Venue")), that settlement of this matter is in the public interest and that entry of this Consent Decree ("Decree") without further litigation is an appropriate way to resolve the United States' claims as raised in the Complaint. Accordingly, the parties hereby consent to the entry of this Decree.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to Section 17(a)(2) of TSCA, 15 U.S.C. §§ 2616(a)(2); Section 301(b) of the CWA, 33 U.S.C. § 1319(b); Section 7003(a) of RCRA, 42 U.S.C. § 6973(a); and 28 U.S.C. §§ 1331 and 1345.

2. Venue is proper in this judicial district pursuant to Section 17(a)(2)(A) and (B) of TSCA, 15 U.S.C. § 2616(a)(2)(A) and (B); Section 301(b) of the CWA, 33 U.S.C. § 1319(b); Section 7003(a) of RCRA, 42 U.S.C. § 6973(a); and 28 U.S.C. § 1391(b), which provide that a civil action may be brought in this district because this is where the Defendant is found, transacts business and where the violations occurred.

3. This Court shall retain jurisdiction over both the subject matter of this Consent Decree and over MSI for the duration of this action. The Court shall oversee the performance of the terms and provisions of this Consent Decree for the purpose of enabling either of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section V (Dispute Resolution) hereof. This Consent Decree shall terminate upon the complete and satisfactory performance by MSI of its obligations under this Decree. MSI shall have the burden of proving that all of MSI's obligations under this Decree have been satisfactorily performed, with the exclusion of the performance of the SOW by Ferex.

II. PARTIES BOUND

4. This Consent Decree applies to and is binding upon the United States and upon MSI, and its successors and assigns. From approximately 1939, MSI, also doing business at various times as McKinney Junk Company and McKinney Metals, Inc., occupied the property at 300 North McDonald in McKinney, Collin County, Texas. The business was first located across the street from the current site, at 325 East Virginia Street, McKinney, Texas.

5. Any change in the ownership or corporate status of MSI including, but not limited to, any transfer of assets or real or personal property shall in no way alter MSI's responsibilities under this Consent Decree.

III. DEFINITIONS

6. Unless otherwise expressly provided herein, terms used in this Decree, which are defined in RCRA, TSCA and the CWA or in regulations promulgated under those statutes, shall have the meaning assigned to them in the statute or in such regulations, including any amendments thereto.

a. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

b. "Contamination" shall mean any hazardous substances, pollutants or contaminants, present or existing in soils, surface, and/or ground water on, under, or adjacent to the MSI facility as of the effective date of this Decree.

c. The "Facility" shall mean the McKinney Smelting, Inc. facility, which is located in McKinney, Collin County, Texas, and those portions of Lamar and Railroad Streets which border MSI.

d. "Parties" shall mean the United States, on behalf of EPA, and McKinney Smelting, Inc.

e. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

IV. DISPUTE RESOLUTION

7. Any dispute that arises with respect to the meaning or application of this Decree shall, in the first instance, be the subject of informal negotiations between the United States and MSI. MSI shall notify the United States of the invocation of this Section. Such period of informal negotiations shall not extend beyond thirty (30) days following written notice that the provisions of the Section have been invoked unless the Parties agree otherwise.

8. If any dispute is not resolved during the informal negotiation period, the position advanced by the United States shall be considered binding unless within thirty (30) days MSI files with this Court a petition which shall describe the nature of the dispute and include a proposal for its resolution. The filing of a petition asking the Court to resolve a dispute shall not postpone MSI's deadlines under this Decree not in or affected by the dispute.

9. The United States shall have thirty (30) days to respond to the petition. Except as set forth below, in any dispute, MSI

shall have the burden based on the record of showing that EPA's position, including without limitation any interpretation of the terms and conditions of this Decree and of applicable federal and state law and regulations, was arbitrary and capricious or otherwise not in accordance with law.

V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

10. MSI agrees to provide to EPA, its authorized officers, employees, representatives, and all other persons performing response, remedial, and/or corrective actions under EPA oversight, an irrevocable right of access at all reasonable times to the areas under MSI's ownership and control which surround the MSI facility or to which access is required for the implementation of such actions. Notwithstanding any provision of this Decree, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under RCRA, TSCA and the CWA and any other applicable statute or regulation, including any amendments thereto.

11. MSI shall ensure that its assignees, subsidiaries, successors in interest, lessees, and sublessees, if any, of any part of the facility shall provide the same access and cooperation. MSI shall ensure that a copy of this Decree is provided to any current lessee or sublessee of any part of the facility as of the effective date of this Decree and shall ensure that any agreement or contract to which MSI is a party for subsequent leases, subleases, assignments or transfers of any part of the facility or an interest in the facility are

consistent with this Section, and Section II (Parties Bound), of the Decree.

VI. DUE CARE/COOPERATION

12. Until such time as all work has been fully performed pursuant to the Ferex SOW and MSI has met all obligations pursuant to this Decree, MSI shall exercise due care on those portions of the facility within its control and shall comply with all applicable local, state, and federal laws and regulations. In the event that MSI becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from any part of the facility, that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, MSI shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of the Comprehensive Environment Response, Compensation and Liability Act of 1980, ("CERCLA"), 42 U.S.C. §9603, or any other law, immediately notify EPA of such release or threatened release. MSI shall cooperate fully with its lessee, Ferex Inc. during Ferex's performance of the remedial action set forth in the "Agreement and Covenant Not to Sue", executed by Ferex and the United States on March 25, 1998 ("Ferex Agreement").

13. To the extent that MSI has possession of the facility, as lessor, MSI shall ensure that public access to the facility is restricted at all times and use best management practices to prevent the recontamination of areas subject to the Ferex Agreement.

VII. COVENANT NOT TO SUE BY THE UNITED STATES

14. In consideration of the payments to be made by MSI under Section XIII and subject to the Reservation of Rights in Section VIII of this Decree, upon MSI's performance of all requirements of this Decree, the United States covenants not to sue or take any other civil or administrative action against MSI for any and all civil liability for civil penalties for violations alleged in the United States Complaint, filed simultaneously with this Decree.

VIII. RESERVATION OF RIGHTS

15. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel MSI (1) to perform further response actions relating to the facility or (2) to reimburse the United States for additional costs of response if, subsequent to EPA's determination that all response activities to be performed in accordance with the Ferex Agreement have been completed:

(i) conditions at the MSI facility previously unknown to EPA, are discovered, or

(ii) information at the MSI facility, previously unknown to EPA, is received in whole or in part, and these previously unknown conditions or this information together with other relevant information indicate that the remedial action performed by Ferex in accordance with the SOW is not protective of human health or the environment.

16. For purposes of Paragraph 15, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of its execution of this Decree, including the information provided to EPA in the document "Phase II Environmental Soil Investigation & Remedial Action Recommendations", prepared for Ferex by CBS Environmental.

17. The covenant not to sue set forth in Section VII above does not pertain to any matters other than those expressly specified in Section VII. The United States reserves, and this Decree is without prejudice to, all rights against MSI with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by MSI to comply with this Decree;

(b) any liability resulting from future releases of hazardous substances, pollutants or contaminants, at or from the facility caused or contributed to by MSI, its successors and assignees;

(c) criminal liability;

(d) liability for violations of local, state or federal law or regulations;

(e) claims for costs incurred by the United States as a result of the failure of MSI to fulfill the requirements of this Decree;

(f) claims based on liability for hazardous substances removed from the facility by MSI;

(g) claims based on future monitoring or oversight expenses incurred by the United States; or

(h) claims for damages to natural resources.

18. Nothing in this Decree is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a party to this Decree.

19. Notwithstanding any other provisions of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

IX. MSI'S COVENANT NOT TO SUE

20. MSI hereby covenants not to sue and not to assert any claims or causes of action against the United States, its authorized officers, employees, or representatives with respect to the facility or this Decree (except to enforce this Decree), including but not limited to, any direct or indirect claims for

reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the facility, or any claims arising out of response, remedial, and/or corrective activities on any portion of the facility, including claims based on the oversight by EPA of such activities or approval of plans for such activities.

X. AUTHORIZATION

21. Each signatory of a Party to this Decree represents that he or she is fully authorized to enter into the terms and conditions of this Decree and to bind legally such Party.

XI. DOCUMENT RETENTION

22. Following the effective date of this Decree, MSI agrees to retain and make available to EPA for a period of ten years (unless otherwise agreed to in writing by the Parties), all nonprivileged documents and information within its possession, or within the possession or control of its employees, contractors, agents or representatives relating to the MSI facility. MSI shall also, upon request, make available to EPA, upon reasonable notice, its employees, contractors, agents or representatives with knowledge of relevant facts concerning the MSI facility and MSI's performance under this Decree. At the end of ten years,

MSI shall notify EPA of the location of such documents and information and shall provide EPA with an opportunity to copy any documents at the expense of EPA. For purposes of this paragraph, if MSI asserts a privilege with regard to any such document or information, MSI shall provide EPA with the following: (1) the title of the document or information; (2) the date of the document or information; (3) the name and title of the author of the document or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document or information; and (6) the privilege asserted.

XII. PAYMENT OF CIVIL PENALTIES

23. MSI shall pay a civil penalty to the United States in the amount of Twenty-five Thousand Dollars (\$25,000). Payment shall be made within thirty (30) days after the Court's entry of this Decree by Electronic Funds Transfer ("EFT") to the United States Department of Justice, in accordance with current EFT procedures, referencing the USAO File Number and DOJ Case Number 90-5-1-1-4458, and the civil action case name and case number of the Eastern District of Texas. The costs of such electronic funds transfer shall be the responsibility of MSI. Payment shall be made in accordance with instructions provided to MSI by the Financial Litigation Unit of the U.S. Attorney's Office in the Eastern District of Texas, Sherman Division. Any funds received after 11:00 a.m. (EST) shall be credited on the next business day. MSI shall provide notice of payment, referencing the USAO File Number and DOJ Case Number 90-5-1-1-4458, and the civil

action case name and case number, to the Department of Justice and to the Enforcement Division, EPA Region 6, as provided in Section XVI (Notices and Submissions).

24. Upon entry of this Decree, this Decree shall constitute an enforceable judgment for purposes of post-judgment collection in accordance with Rule 69 of the Federal Rules of Civil Procedure, the Federal Debt Collection Procedure Act, 28 U.S.C. § 3001-3308, and other applicable federal authority. The United States shall be deemed a judgment creditor for purposes of collection of any unpaid amounts of the civil and stipulated penalties and interest.

XIII. STIPULATED PENALTIES

25. If MSI fails to pay the full amount of the civil penalty within thirty (30) days of the Court's entry of this Decree, MSI shall pay \$1000.00 per day for each day that the civil penalty is late, without demand, plus interest accruing from the thirty-first (31st) day following entry, at the interest rate established pursuant to 28 U.S.C. § 1961.

26. Stipulated penalties shall accrue as provided in Paragraph 25 regardless of whether EPA has made a demand for payment, but need only be paid upon demand. Payment of stipulated penalties shall be made within thirty (30) days of the date of a written demand for payment.

27. Any interest owed or stipulated penalties incurred by MSI shall be paid in accordance with the payment procedures for electronic fund transfers as set forth in Paragraph 23 above.

28. The stipulated penalties set forth in this Section do not preclude the United States from pursuing other remedies or sanctions which may be available to the United States by reason of MSI's failure to comply with any of the requirements of this Decree.

29. Notwithstanding any provision of this Consent Decree, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree.

30. In addition to any other stipulated penalties and interest otherwise owed under this Decree, if MSI fails to comply with the terms of this Decree, it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Decree or otherwise obtain compliance.

XIV. EFFECT OF CONSENT DECREE

31. This Decree constitutes full settlement of the claims of the United States for civil penalties for the violations alleged in the Complaint filed in this action.

32. The United States enters into the Consent Decree based on MSI's representations regarding its financial condition. This Decree does not constitute an adjudication of MSI's ability to pay any amount.

33. The United States reserves the right to seek the full amount of civil penalties demanded in the Complaint if the United States discovers that MSI withheld information material to the United States' financial analysis of MSI or that MSI provided

information to the United States regarding its financial condition that was materially inaccurate.

XV. NOTICES AND SUBMISSIONS

34. Whenever, under the terms of this Decree, notice is required to be given or a document sent by one Party to another, it shall be directed to the individuals, or their future counterparts, at the addresses specified below:

As to the Department of Justice:

Chief, Environmental Enforcement Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611 - Ben Franklin Station
Washington, D.C. 20044
DJ # 90-5-1-1-4458

As to EPA

Director, Compliance Assurance and Enforcement Division
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

As to Settling Defendant:

Mr. Benjamin L. Smith
McKinney, Texas 75069

XVI. EFFECTIVE DATE

35. Unless otherwise provided herein, this Decree shall be effective upon entry of the Decree by the Court.

XVII. TERMINATION

36. The provisions of this Decree shall be deemed satisfied, and the Court shall terminate the Decree upon the Court's receipt of written notice from the United States that MSI has demonstrated that all of the terms of this Decree have been completed.

XVIII. PUBLIC COMMENT


37. This Decree shall be subject to a thirty (30) day public comment period after lodging the Decree with this Court, after which the United States may modify or withdraw its consent to this Decree if the comments received disclose facts or considerations which indicate that this Decree is inappropriate, improper or inadequate.

XIX. MODIFICATION

38. Except as provided for herein, there shall be no modification of this Decree without the written approval of all Parties to this Decree and filing of such modification with the Court or by order of the Court.

IT IS SO ORDERED.


SIGNED AND ENTERED this 16th day of Sept. 1998.

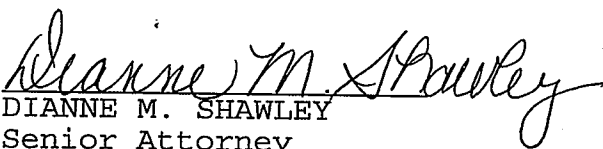

United States District Judge
Eastern District of Texas

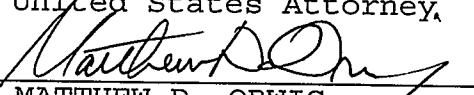
For McKinney Smelting, Inc.:

Benjamin L. Smith, Pres.
BENJAMIN SMITH
President,
McKinney, TX 75070

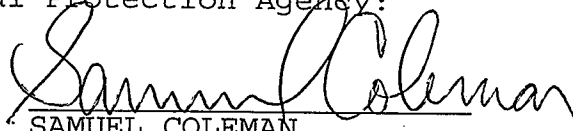
For the United States:


WALKER B. SMITH
Deputy Chief
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice


DIANNE M. SHAWLEY
Senior Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-0096

MIKE BRADFORD
United States Attorney,
BY: 
MATTHEW D. ORWIG
Assistant United States Attorney
Eastern District of Texas
Texas Bar No. 15325300
660 North Central Expressway
Suite 400
Plano, Texas 75704
(972) 509-1201

For the U.S. Environmental Protection Agency:

A handwritten signature in cursive script, appearing to read "Samuel Coleman", is written over a horizontal line.

SAMUEL COLEMAN

Director, Compliance Assurance and
Enforcement Division
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES of AMERICA,

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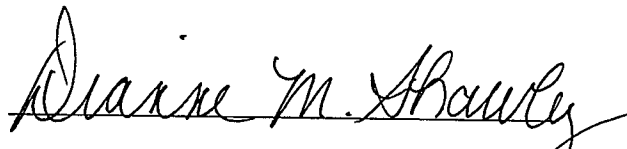
Defendant.

Civil Action
No. 97-

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMPLAINT, NOTICE OF LODGING, AND CONSENT DECREE have been sent on this day, the 8th day of July, 1998, postage prepaid, by United States mail to the following counsel for Defendant McKinney Smelting, Inc.:

Richard Abernathy
Abernathy, Roeder, Robertson, Boyd & Joplin
101 East Davis Street
P.O. Box 1210
McKinney, Texas 75069-1210


Dianne M. Shawley, Sr. Attorney